LIM CHIEW v. SITEMAN CONSTRUCTION SDN BHD; LEE CHAO YONG (APPLICANT)

HIGH COURT MALAYA, KUALA LUMPUR
LAU BEE LAN J
[COMPANIES (WINDING-UP) NO: D-28NCC-186-2010]
25 OCTOBER 2015

CIVIL PROCEDURE: *Committal proceedings – Application for – Whether court seised with jurisdiction to hear application – Whether applicant had locus standi – Whether statement and affidavit contained misrepresentation of material facts and were misleading – Whether applicant guilty of mala fide – Whether there was delay in commencing committal proceedings*

The two applications herein were, *inter alia* (i) the applicant's application in encl. 84 pursuant to O. 52 r. 4 of the Rules of Court 2012 ('ROC') for committal proceedings of the liquidator of the respondent ('the liquidator') for alleged contempt of court and/or interfering with the administration of justice; and (ii) the liquidator's application in encl. 90: (a) to set aside the *ex parte* order dated 26 November 2014 ('*ex parte* order') ('encl. 83') granted to the applicant to apply for an order of committal against the liquidator; and (b) if the application was allowed, all committal proceedings pursuant to the *ex parte* order will be set aside. The two purported false statements that the applicant alleged was made by the liquidator were contained in the affidavit affirmed by the liquidator on 3 March 2014. On the other hand, the liquidator's grounds for setting aside the *ex parte* order were: (i) the issue of jurisdiction; (ii) that the applicant had no *locus standi* to apply for an order of committal; (iii) O. 52 r. 3(2) statement and affidavit contained misrepresentation of material facts and were misleading; (iv) *mala fide* on the part of the applicant; and (v) delay in commencing the committal proceedings. In essence, the liquidator contended that the court had no jurisdiction to hear the committal proceedings since (a) the grant of the order dated 7 May 2014 which was based on the reasons that 'there was a *prima facie* contempt of court in Suit 291 by the liquidator' was substantially different from the reasons advanced in obtaining the *ex parte* order (encl. 83). Further, since the reason advanced by the applicant was abandoned by the applicant, the applicant should get fresh leave of the court; and (b) the main issue in the contempt proceedings was the purported contempt by the liquidator in Suit 291 and not the winding up suit before this court. The proper court to file the application for leave for contempt, therefore, should be the court which heard Suit 291.

Held (striking off encl. 84 with costs):

(1) The *ex parte* order was a regularly obtained order and the present committal proceedings *vide* encl. 84 was proper and the court was seised with the jurisdiction to hear encl. 84. Hence, the submission of the liquidator was not sustainable. (para 6)

(2) The judge in Suit 291 held that the advances made by the applicant towards the respondent constituted debt and thus, the applicant stood in the position of an unsecured creditor and hence, had *locus standi*. However, notwithstanding that the applicant had *locus standi* to apply for a committal order, the applicant's complaints did not amount to contempt. The remedy of the applicant as a creditor regarding his complaints on the conduct of the liquidator lies in the various statutory provisions of the Companies Act 1965 ('CA'). (paras 12 & 13)

(3) The argument of the liquidator, that since the applicant was not a shareholder and creditor, he did not have sufficient interest in the first and second alleged false statements, was unacceptable. The first paragraph of the statement made no reference to the applicant not being a creditor. Further, the status of the applicant, *ie,* as to whether he was a shareholder of the respondent, was a live issue and is pending determination in the Federal Court. Therefore, the applicant had sufficient interest in the matter to give the applicant the *locus standi* (*Arthur Lee Meng Kwang v. Faber Merlin (M) & Ors*, foll). (paras 14-17)

(4) The applicant must not only make full disclosure of all material facts but must also draw attention to all relevant factors including documents exhibited in the supporting affidavit so as not to mislead the court. In the instant case, the statement was very important and was akin to a charge sheet against an accused in a criminal proceeding. Hence, the applicant was required to adequately describe and particularise the alleged act of contempt in the statement and must not represent or mislead any facts in the statement. A perusal of the relevant paragraphs showed that the paragraphs did not contain any statement under oath made by the liquidator as alleged by the applicant. (paras 20-21 & 24)

(5) Although the applicant had identified two false statements allegedly made by the liquidator under oath in the affidavit affirmed on 3 March 2014, the court could not find the false statements. The applicant's assertion at para. 14 of the statement was a misleading feature of the statement. Further, there was nothing in the liquidator's evidence in Suit 291 which was contradictory or inconsistent with the first alleged false statement. What the liquidator had affirmed in the affidavit of 3 March 2014 was different from the first alleged false statement. As for the second alleged false statement, the liquidator did not make such a statement in the affidavit of 3 March 2014. In the circumstances, the charge of making the alleged false statements and for committal was unsustainable. (paras 25-27, 32, 33 & 39)

(6) The issue of *mala fides* on the part of the applicant was irrelevant and there was no delay in the commencement of the committal proceedings. The order obtained on 7 May 2014 was a pre-requisite under the CA and common law in order for the applicant to proceed with contempt proceedings against the liquidator as an officer of the court. The

application for leave under O. 52 r. 3 of the ROC is the foundation of any committal proceedings and time is of essence in any committal proceedings. In the present case, there was no delay from the time of obtaining the *ex parte* order of 26 November 2014 up until the filing of encl. 84. (paras 40 & 42)

Case(s) referred to:

Arthur Lee Meng Kwang v. Faber Merlin (M) Bhd & Ors [1986] 2 CLJ 109; [1986] CLJ Rep 58 SC ***(foll)***

Bakmawar Sdn Bhd v. Malayan Banking Bhd [1991] 3 CLJ 1759; [1991] 2 CLJ (Rep) 323 HC ***(foll)***

Ipmuda Trading Sdn Bhd v. Khoo Kiat Piau & Anor [1997] 1 CLJ Supp 158 HC ***(dist)***

Karam Singh Veriah v. Karpal Singh [1987] 1 CLJ 63; [1987] CLJ (Rep) 680 HC ***(dist)***

Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd [2013] 6 CLJ 673 FC ***(not foll)***

Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors [2012] 2 CLJ 849 FC ***(refd)***

Tan Sri G Darshan Singh v. Tetuan Azam Lim & Pang [2013] 1 CLJ 1060 CA ***(refd)***

Legislation referred to:

Companies Act 1965, ss. 236(3), 274(1), 277(2), 279
Companies (Winding-up) Rules 1972, r. 125
Courts of Judicature Act 1964, ss. 3, 13, 23, 24
Federal Constitution, s. 126
Rules of Court 2012, O. 52 rr. 3(2), 4
Rules of the High Court 1980, O. 52 r. 2(2)

For the applicant - Mark Ho (Jananee Gopal with him); M/s Chellam Wong
For the liquidator - RK Sharma (Kelvin Seet with him); M/s Vicknaraj, RD Ratnam, Rajesh Kumar & Assocs

Reported by S Barathi

JUDGMENT

Lau Bee Lan J:

[1] There were two applications before the court. One is encl. 84, the applicant's application for committal proceedings (*inter partes*) of the liquidator of the respondent, Mr Subramaniam a/l AV Sanker for alleged contempt of the court and/or interfering with the administration of justice made pursuant to O. 52 r. 4 of the Rules of Court 2012 ('RC 2012').

[2] The other application is encl. 90 filed by the liquidator of the respondent, Mr Subramaniam a/l AV Sanker (i) to set aside the *ex parte* order dated 26 November 2014 ('*ex parte* order') (encl. 83) granted to Lee Chao Yong ('applicant') to apply for an order of committal against the liquidator of the respondent; and (ii) if the application is allowed, all committal proceedings pursuant to the *ex parte* order will be set aside.

[3] The two purported false statements that the applicant alleged was made by the liquidator of the respondent are contained in the affidavit affirmed by him on 3 March 2014 (exh. LCY-13, encl. 79) in particular, para. 16(i) and 16(ii) respectively as follows:

(a) A creditor's and contributory's meeting was held on 30 November 2011, wherein a committee of inspection was appointed ('first alleged false statement'); and

(b) The respondent had on 30 November 2011 allowed Deck Master Sdn Bhd and Foremost Systems Sdn Bhd, to attend and vote in the creditor's and contributory's meeting held on 30 November 2011 ('the contingent creditors') ('second alleged false statement').

[4] The grounds for setting aside the *ex parte* order are:

(a) the issue of jurisdiction;

(b) the applicant has no *locus standi* to apply for an order of committal;

(c) Order 52 r. 3(2) statement and affidavit contained misrepresentation of material facts and are misleading;

(d) *mala fide* on the part of the applicant; and

(e) delay in commencing this committal proceedings.

Issue Of Jurisdiction

[5] In essence the liquidator of the respondent contends that this court has no jurisdiction to hear the committal proceedings as:

(a) The order dated 7 May 2014 (exh. LCY-12 in encl. 79, affidavit in support of the applicant's notice of motion dated 26 November 2014 (encl. 80) affirmed by the applicant on 26 November 2014) obtained pursuant to the notice of motion dated 7 January 2014 of the liquidator of the respondent (encl. 49) was granted based on the reasons advanced by the applicant on the premise that "there is a *prima facie* contempt of court in Suit 291 by the liquidator" which is substantially different from the reasons advanced in obtaining the *ex parte* order (encl. 83). The *ex parte* order was obtained pursuant to the applicant's notice of motion dated 26 November 2014 (encl. 80), the affidavit in support affirmed by the applicant on 26 November 2014 (encl. 79) and the statement pursuant to O. 52 r. 3 of RC 2012 (encl. 82) ('the statement'). Since the reasons advanced by the applicant in encl. 49 is abandoned by the applicant, the applicant should get fresh leave of the court. The liquidator of the respondent cited:

(i) *Serac Asia Sdn Bhd v. Sepakat Insurance Brokers Sdn Bhd* [2013] 6 CLJ 673; [2013] 5 MLJ 1 at p. 692 pp. 694-695 (CLJ); p. 13 para. 31 & p. 15 (MLJ) para. 35 for the proposition that:

judgment cannot be set aside unless the judgment was made in defiance of a substantive statutory prohibition which renders it null and void on the grounds of illegality or lack of jurisdiction.; and

(ii) *Black's Law Dictionary* 7th edn:

meaning of judicial jurisdiction - legal power and authority of a court to make a decision that binds the parties to any matter properly brought before it.;

(b) the main issue in this contempt proceedings is the purported contempt by the liquidator of the respondent in Kuala Lumpur High Court Civil Suit No. D-22NCC-291-03-2012 ('Suit 291') and not the winding up suit before this court (Winding Up No. D-28NCC-186-2010). The proper court to file the application for leave for contempt should be in the court which heard Suit 291 ie, where the alleged contempt, if any occurred and not this court. The liquidator of the respondent cited:

(i) Malaysian Civil Procedure 2013 p. 674:

An application for an order of committal should ordinarily be made to the court where the contempt is committed ...

(ii) *Karam Singh Veriah v. Karpal Singh* [1987] 1 CLJ 63; [1987] CLJ (Rep) 680; [1988] 2 MLJ 603 (HC) at 604 C:

I found that the alleged contempt of court, if any, occurred before Mr. Justice Mustapha in the High Court at Alor Star. That court has full powers to deal with contempt of itself - article 126 of the Federal Constitution; section 13(2) of the Courts of Judicature Act 1964. I accordingly held that the application for leave should be made there ...

(iii) *Ipmuda Trading Sdn Bhd v. Khoo Kiat Piau & Anor* [1997] 1 CLJ Supp 158; [1996] 5 MLJ 637 (HC) at 644 I-645 A:

In *Karam Singh Veriah v. Karpal Singh* [1988] 2 MLJ 603 it was held that an application for an order of committal should be made in the court where the contempt was committed. In the premises I was of the view that the sessions court had no jurisdiction to entertain the application for contempt ...

[6] I am of the view that the submission of the liquidator of the respondent is not sustainable. The *ex parte* order is a regularly obtained order and the present committal proceedings *vide* encl. 84 is proper and I find this court is seised with the jurisdiction to hear encl. 84 for these reasons:

(a) The application for committal is made and premised on the statements made by the alleged contemnor in his affidavit affirmed on 3 March 2014 (exh. LCY-13 in encl. 79) and filed in this court (and not in the Suit 291 court);

(b) The leave application of encl. 49 pertains to leave to commence proceedings against the liquidator as an officer of the court (see para. 14 of the affidavit in support affirmed by the applicant on 7 January 2014 (encl. 48)). The applicant is not bound by encl. 49 in these proceedings for committal. Committal proceedings are fresh proceedings, the basis and grounds of which are in the statement and in the affidavit in support, and not encl. 49.

(c) In any event, the liquidator of the respondent has not come with clean hands in that he has chosen not to read the contents of encl. 49 wholly. It is observed that para. 14 of the affidavit in support affirmed on 7 January 2014 by the applicant (encl. 48) in support of encl. 49 states:

> 14. By reason of the facts abovestated, I am advised by my solicitors and verily believe that as the Liquidator is appointed by this Honourable Court, leave of this Honourable Court is required before proceedings may be commenced against him. The above grounds also are sufficient to show *prima facie* contempt of court by the Liquidator in Suit 291 as well as in this Honourable Court.
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> (emphasis added)

(d) Both the cases of *Ipmuda Trading* (*supra*) and *Karam Singh Veriah* (*supra*) can be distinguished. The passage relied on by the liquidator of the respondent in *Ipmuda Trading* is with respect *obiter dicta* (see p. 638 C-D). As for *Karam Singh Veriah*'s case, reading the passage relied on by the liquidator of the respondent, I am inclined to agree with the applicant that it is not *per se* saying that the learned judge in the High Court at Alor Setar has no jurisdiction but rather that court is the more appropriate court to deal with contempt of itself. The reason being the High Court in Malaya in the exercise of its powers within its local jurisdiction has the jurisdiction to hear committal proceedings (see s. 126 of the Federal Constitution; ss. 3, 13, 23 & 24 Courts of Judicature Act 1964 (Revised -1972) (Act 91)). Since the statements upon which the applicant mounted the application for committal proceedings were filed in this court as alluded to in para (a) above, the issue of jurisdiction does not arise.

(e) Enclosure 49 was exhibited as exh. SS-1 by the liquidator of the respondent in encl. 88, particularly, para. 14 to support their contention that there was inordinate delay of six months in commencing this committal proceeding and not the issue of jurisdiction. Hence I am incline to accept the applicant's submission that the issue of jurisdiction is more of an afterthought as it has not been averred in the affidavits of the liquidator of the respondent and was raised for the first time in the applicant's additional submissions.

(f) I am of the view that case of *Serac* (*supra*) is not applicable in this instant case since I hold that this court is clothed with the jurisdiction to hear the committal proceedings (encl. 84).

***Locus Standi* Of The Applicant**

[7] *Arthur Lee Meng Kwang v. Faber Merlin (M) Bhd & Ors* [1986] 2 CLJ 109; [1986] CLJ Rep 58 concerns an application by Arthur Lee, an advocate, for an order to set aside (i) the *ex parte* leave order of the court granting Faber Merlin Malaysia Bhd and two Others (complainants) leave to commence committal proceedings for contempt under O. 52 r. 2 Rules of the High Court 1980 read with r. 4 of the Rules of the Supreme Court and (ii) the notice of motion pursuant to the said leave. Several objections were raised by counsel for the advocate. Of relevance to this present case is the objection that the complaints have no *locus standi*.

[8] Mohd Azmi SCJ (as His Lordship then was) (delivering judgment on behalf of the Supreme Court) at 62 e-f opined:

> When the contempt is not committed in the face of the Court, as is the case alleged here, it is equally important that the dignity and integrity of the Court be protected and preserved, and in such cases the contempt proceedings may be initiated by motion either by the Attorney-General or **any private party who has sufficient interest in the matter**, or even by the Court itself, although in practice it seems unjust to expect the Court to protect itself by being both complainant and Judge, save in the unlikely event of the Attorney-General or the appropriate private party declining to act. *In this case, the complainants are the successful parties in the two civil appeals, from which the present contempt proceeding arose. Surely, the complainants and their advocates and solicitors have sufficient interest in this matter to give them locus standi*. (See also *MBf Holdings Bhd. v. Emtex Corporation Bhd*. SCCA 213/85; and *Tan Sri Haji Othman Saat v. Mohamed bin Ismail* [1982] 2 MLJ 177). (emphasis added)

[9] The first and second alleged false statements alluded to in para. 3 above are concerned with creditors' and contributories' meeting and the contingent creditors. With regard to the creditors' and contributories' meeting, the applicant further complained at para. 18 of the statement as follows:

> (i) The purported creditors and contributories meeting held on 30/11/2011 is contrary to Rule 114 of the Rules, i.e. notice of the said meetings were neither advertised nor gazetted.
>
> (ii) In the absence of any advertisement or gazette of the notice of meetings, there does not seem to appear that the Alleged Contemnor [the Liquidator of the Respondent] applied to court for any directions contrary to the provisions of section 237 of the Companies Act, 1965.

(iii) Till todate, the Alleged Contemnor has failed to settle a list of contributories contrary to section 244 of the Companies Act, 1965 and Rule 67 of the Rules.

(iv) It seems that the Alleged Contemnor allowed the two (2) contingent debtors to attend and vote during the purported creditors meeting held on 30/11/2011 contrary to Rule 125 of the Rules.

(v) There is no evidence of any admission and/or rejection by the Alleged Contemnor of the proof of debts filed by the two (2) contingent debtors.

[10] In arguing that the applicant has no *locus standi*, learned counsel for the liquidator of the respondent submits:

(i) only creditors and contributories would have an interest or otherwise of the truth of the first and second alleged false statements;

(ii) if the creditors and contributories are not satisfied with the liquidator of the respondent's act in calling and conducting the creditors' and contributories' meeting held on 30 November 2011 or the admission or rejection of any proof of debt, they are entitled to challenge the same under various statutory provisions of the Companies Act 1965 ('CA 1965') such as ss. 236(3), 274(1), 277(2) and 279 of CA 1965. These are provisions wherein the court has supervisory control over the act and conduct of the liquidator, who is an officer of the court.

[11] The said provisions are reproduced as follows:

Section 236(3)

The exercise by the liquidator of the powers conferred by this section shall be subject to the control of the Court, and **any creditor or contributory may apply to the Court** with respect to any exercise or proposed exercise of any of those powers. (emphasis added)

Section 274 (1)

The liquidator or any contributory or creditor may apply to the Court:

(a) to determine any question arising in the winding up of a company; or

(b) to exercise all or any powers which the Court might exercise if the company were being wound up by the Court. (emphasis added)

Section 277(2)

The Court shall take cognisance of the conduct of liquidators, and if a liquidator does not faithfully perform his duties and observe the prescribed requirements or the requirements of the court or **if any complaint is made to the Court by any creditor or contributory** or by the Official Receiver in regard thereto, the Court shall inquire into the matter and take such action as it thinks fit. (emphasis added)

Section 279

Any person aggrieved by any act or decision of the liquidator may apply to the court which may confirm reverse or modify the act or decision complained of and make such order as it thinks just.

[12] With respect, I do not agree that the applicant has no *locus standi*. My reasons are these. I take cognisance of the fact drawn to the court's attention by learned counsel for the applicant that the learned judge in Suit 291 held that by virtue of the advances made by the applicant towards the respondent, they constitute a debt and hence the applicant stands in the position of an unsecured creditor (para. 31 of the grounds of judgment in Suit 291, exh. SS-5 of encl. 88, liquidator of the respondent's affidavit in reply in opposing encl. 84 and in support of encl. 90).

[13] However notwithstanding that the applicant has *locus standi* to apply for a committal order, I find the applicant's complaints in my view do not amount to contempt for the following reason. It can be seen that the real thrust of the applicant's complaints are as stated in para. 18 of the statement (this will become apparent when I discuss the issue of 'misrepresentation of statements' later). In this regard I am inclined to agree with the oral submission of Mr Kelvin Seet that the remedy of the applicant as a creditor regarding his complaints on the conduct of the liquidator of the respondent lies in the various statutory provisions of the Companies Act 1965 which I have referred in para. 8.2 above.

[14] The liquidator of the respondent submits based on para. 1 of the statement the applicant has admitted that he is a former director and shareholder of the respondent as he had relinquished his shareholdings on 6 April 2010, prior to the winding-up of the respondent on 11 June 2010. The liquidator of the respondent further submits that since the applicant is not a shareholder and creditor, he does not have sufficient interest in the first and second alleged false statements. The liquidator of the respondent cited *Tan Sri G Darshan Singh v. Tetuan Azam Lim & Pang* [2013] 1 CLJ 1060; [2013] 5 MLJ 541 where at 1068 (CLJ); 549 (MLJ) para. 14 the Court of Appeal held, *inter alia*, "Strict compliance not only means that the applicant is bound by the mandatory statement under O. 52 r. 2(2) [RHC 1980] ...".

[15] With respect I am unable to accept the argument of the liquidator of the respondent. First, para. 1 of the statement makes no reference to the applicant not being a creditor. Secondly, I am of the view that the case of *Tan Sri Darshan Singh* (*supra*) need not be considered for determining the issue of whether the applicant has the *locus standi* as I regard the applicant is a creditor for the reason stated in para. 9 above.

[16] Further, I find the status of the applicant of whether he is a shareholder of the respondent is currently the subject matter for the deliberation of the Federal Court *vide* Civil Application No. 08-232-05-2014 and ought not to be ventilated here (see exh. LCY-10 of encl. 79, copy of the motion for leave to appeal and the affidavit in support).

[17] Since the status of the applicant of whether he is a shareholder of the respondent is a live issue and pending determination of the Federal Court, following the approach of the Supreme Court in *Arthur Lee Meng Kwang*'s case (*supra*) as can be seen in the passage from the report as emboldened in para. 7.1 above, I am of the view that the applicant has sufficient interest in this matter to give the applicant the *locus standi*.

Misrepresentation Of Statements

[18] In *Tan Sri Dato' (Dr) Rozali Ismail & Ors v. Lim Pang Cheong & Ors* [2012] 2 CLJ 849, Arifin Zakaria CJ (delivering judgment on behalf of the Federal Court) at 861 held:

> [29] It is settled law that committal proceeding is criminal in nature since it involves the liberty of the alleged contemnor. Premised upon that, the law has provided procedural safeguards in committal proceeding which requires strict compliance.

[19] One of the important procedural safeguards governing an application for leave to commence committal proceeding is provided in O. 52 r. 3(2) RC 2012. This provision is in *pari materia* with O. 52 r. 2(2) of the RHC 1980. In *Tan Sri Dato' (Dr) Rozali Ismail & Ors*, when dealing with O. 52 r. 2(2) RHC 1980 at 863 Arifin Zakaria CJ opined:

> [36] The safeguards in r. 2(2) entail the application to be supported by a statement describing amongst others, the person sought to be committed and the grounds on which he is alleged to be in contempt. It must be supported by an affidavit verifying the facts relied on in the statement.
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> [37] We wish to state in clear term that *the alleged act of contempt must be adequately described and particularised in detail in the statement itself. The accompanying affidavit is only to verify the facts relied in that statement. It cannot add facts to it. Any deficiency in the statement cannot be supplemented or cured by any further affidavit at a later time. The alleged contemnor must at once be given full knowledge of what charge he is facing so as to enable him to meet the charge. This must be done within the four walls of the statement itself.* The same approach was taken by the Supreme Court in *Arthur Lee Meng Kwang* case, *supra*. (See also *Sykt M Mohamed v. Mahindapal Singh Joginder Singh & Ors* [1991] 1 CLJ 582; [1991] 4 CLJ (Rep) 16.)
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> (emphasis added)

[20] In the light of the principles enunciated by the Federal Court, it is clear that the statement is very important and it is akin to a charge sheet against an accused in a criminal proceeding. Hence not only is the applicant required to adequately describe and particularise the alleged act of contempt in the statement, he must not misrepresent or mislead any facts in the statement.

[21] The applicant filed the statement in encl. 82 in support of his application for leave to apply for an order of committal. The grounds for committal are set out in s. VI of the statement, from pp. 10-12. Section VI of the statement contains five paragraphs, namely paras. 12 to 16.

[22] Para 12 of the statement states:

> VI. Grounds Upon Which Relief is Sought
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> 12. Contrary to the testimony of the Alleged Contemnor in Suit 291 as at 11/10/2012, the Alleged Contemnor has recently made contradictory and false statements under oath in this court, the particulars of which are as follows:

[23] The particulars of the contradictory and false statements allegedly made by the liquidator under oath are set out in paras. 13 to 16 of the statement.

[24] A perusal of paras. 13, 14 and 15 of the statement show that these paragraphs do not contain any statement under oath made by the liquidator of the respondent as:

(a) Paragraph 13 relates to the findings of fact made by the learned judge in the application for removal of the liquidator of the respondent ('removal application').

(b) Paragraphs 14 and 15 are narrative of certain facts.

[25] Paragraph 16 of the statement states:

> 16. During the application by the Applicant for leave of this Court to proceed against the Alleged Contemnor (an officer of the court), wherein this court granted leave to the Applicant to proceed against the Alleged Contemnor (an officer of the court) on 7.5.2014, the Alleged Contemnor had made certain false statements under oath *vide* an affidavit affirmed on 3.3.2014 ("the Affidavit of 3.3.2014"). The said statements are as follows:
>
> (i) That a Creditor's and Contributory's Meeting was held on 30.11.2011, wherein a Committee of Inspection was appointed.
>
> (ii) The First Alleged Contemnor had on 30.11.2011 allowed Deck Master Sdn Bhd and Foremost Systems Sdn Bhd, to attend and vote in the Creditor's and Contributory's Meeting held on 30.11.2011 (hereinafter collectively referred to as "the contingent creditors").

The applicant identified the two false statements allegedly made by the liquidator of the respondent under oath in the affidavit affirmed on 3 March 2014 ('affidavit of 3 March 2014', exh. LCY-13 in encl. 79). The first alleged false statement is in para. 16(i) and the second alleged false statement is in para. 16(ii) of the statement as reproduced and which I have alluded to at para. 3 above.

[26] On examination of the affidavit of 3 March 2014, I cannot find the first and second alleged false statements and the nearest is para. 12 which states:

> 12. Saya merujuk kepada perenggan 11 Afidavit Lee dan menyatakan seperti berikut:
>
> (i) Saya telah memberi notis mesyuarat pemiutang pemiutang pada 3.11.2011.
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> (ii) Saya telah memberikan notis kepada penyumbang penyumbang syarikat Responden mengenai mesyuarat penyumbang pada 3.11.2011.
>
> (iii) Saya telah mengadakan mesyuarat pemiutang-pemiutang syarikat Responden pada 30.11.2011.
>
> (iv) Saya telah mengadakan mesyuarat penyumbang-penyumbang syarikat pada 30.11.2011.
>
> Kini dilampirkan dan diekshibitkan sebagai "Ekshibit SS-3" adalah notis-notis dan minit mesyuarat yang diadakan oleh saya.

[27] The applicant seems to suggest that the liquidator of the respondent's first alleged false statement must be a lie because the learned judge had on 18 June 2013 in the removal application made a finding of fact that the liquidator "failed to call for any creditors and contributories meeting". In my view the applicant's contention cannot be sustained for the following reasons which have been submitted by the liquidator of the respondent:

(a) First, looking at para. 12 of the statement it must be noted that the finding of fact of the learned judge is not a ground for committal and the charge of false statement relates solely to the liquidator of the respondent's testimony in Suit 291.

(b) Second, contrary to the applicant's assertion, the learned judge merely held that "the liquidator should call for a meeting with the creditors and the contributories to review the affairs of the respondent company". The learned judge did not hold that the liquidator "failed to call for any creditors and contributories meeting" as alleged (exh. LCY-8 p. 13 grounds of decision).

(c) Third, even if assuming that the learned judge did make such a finding, that finding of fact by the learned judge is not a statement under oath by the liquidator. There can be no basis for any alleged false statement with respect to the findings of fact by the learned judge.

(d) Fourth, the decision of the learned judge in the removal application was set aside by the Court of Appeal on 8 April 2014 whilst the application for *ex parte* leave for committal proceedings was filed on 26 November 2014, seven months after the setting aside. Thus the High Court decision

of 27 August 2013 was no longer valid. In my view what the applicant asserted, *inter alia*, at para. 14 of the statement that "on 8 April 2014 the Court of Appeal allowed the petitioner's appeal on a preliminary point" is a misleading feature of the statement. The reason being looking at the order of the Court of Appeal (exh. LC Y-9) (material part), it can be seen it is a unanimous decision:

> Rayuan Perayu di benarkan dan perintah Mahkamah Tinggi bertarikh 27.8.2013 yang melantik Encik Chang Chee Ming sebagai pelikuidasi bersama syarikat Siteman Construction Sdn Bhd (dahulunya dikenali sebagai Jasa Sentosa (M) Sdn Bhd (No Syarikat: 268677-T) di ketepikan.

[28] The applicant further contends that the liquidator of the respondent in Suit 291 did not mention or raise the fact that the creditors' and contributories' meetings were held on 30 November 2011. In support of his contention, the applicant reproduced the relevant excerpts of the liquidator of the respondent's testimony in Suit 291 in para. 19 of the statement (pp. 13-16). The excerpts of the liquidator's testimony in Suit 291 are the notes of cross-examination of the liquidator of the respondent. It is observed that during the cross-examination, the liquidator of the respondent was never asked any question on any creditors' or contributories meeting of the respondent. Thus in my view it would be unfair to accuse the liquidator of the respondent of not having raised the relevant fact.

[29] At para. 9 of the statement, the applicant stated:

> In the Statement of Claim filed in Suit 291 as at 2.3.2012, the Alleged Contemnor pleaded at para 12 therein that "The Plaintiff was wound up due to insufficient funds to meet its obligations to lawful creditors as and when the same fell due".

[30] In this regard the applicant reproduced portions of the liquidator of the respondent's witness statement dated 8 October 2012 and the evidence during cross-examination on 11 October 2012 in Suit 291 in paras. 10 and 11 of the statement respectively (pp. 6-9).

[31] On examining the liquidator of the respondent's evidence in Suit 291 as reproduced by the applicant, I find the former had never said under oath in Suit 291 that no creditors' or contributories meeting of the respondent was ever held. Therefore I am of the view there is nothing in the liquidator of the respondent's evidence in Suit 291 which is contradictory or inconsistent with the first alleged false statement.

[32] For the reasons above I am of the view that what the liquidator of the respondent affirmed in the affidavit of 3 March 2014 is different from the first alleged false statement in para. 16(i) of the statement. In *Tan Sri Dato' (Dr) Rozali Ismail*'s case (*supra*) it was contended on behalf of the respondents

that the statement filed by the applicants is vague, ambiguous, imprecise and lacking in material particulars (para. 45 at 865 of the report). The Federal Court at 867 para. 55 held:

> Therefore, the question of breach of the said order does not arise. Similarly the averments in the 1st respondent's affidavit in opposition regarding the released sum cannot be said to be untrue or a lie as alleged by the applicants. On that premise, we hold that para. 3 of the statement filed in pursuant of O. 52 r. 2(2) of the RHC is unsustainable.

The Federal Court allowed the respondents' applications to set aside the leave order issued against them and the motion for committal against the respondents was accordingly struck out with costs.

[33] As for the second alleged false statement, the liquidator of the respondent did not make such a statement in the affidavit of 3 March 2014. The applicant submits that when the affidavit of 3 March 2014 is read with the minutes of the creditors' and contributories' meetings (exh. LCY-13 in encl. 79), para. 16(ii) of the statement captured the gist of what the liquidator of the respondent said. I agree with the submission of the liquidator of the respondent that the applicant's argument is fundamentally flawed as we are dealing with a serious charge of making false statements and therefore the charge has to be specific; the court cannot be asked to make inferences from other documents and even if there is inaccuracy in the statement, it is not a mere technical irregularity which can be cured by reference to the exhibit in the affidavit. I am mindful of the *dicta* of the Federal Court in the case of *Tan Sri Dato' (Dr) Rozali Ismail* in para. 37 as emboldened in para. 13 above. Therefore I am of the view that the court was misled.

[34] In *Bakmawar Sdn Bhd v. Malayan Banking Bhd* [1991] 3 CLJ 1759; [1991] 2 CLJ (Rep) 323 at 326; [1992] 1 MLJ 67 (HC) at 72 E-F, Siti Norma Yaakob J (as Her Ladyship then was) stated:

> It is true that the defendant's letter was exhibited to the plaintiff's *ex parte* application but it is incumbent upon the plaintiff on an *ex parte* application of this nature not only to make full disclosures but also to draw attention to all relevant factors so as not to mislead the court into making an order that it would not have necessarily made.

[35] In this case, the plaintiff, a customer of the defendant, MBB sought an *ex parte* interim injunction preventing the defendant from submitting details to the Biro Maklumat Cek and the defendant applied to set aside the injunction. An *ex parte* application for committal proceedings like an *ex parte* application for injunction involves full and frank disclosure. Hence I am of the view that the principle in *Bakmawar* (*supra*) that the applicant must not only make full disclosure of all material facts but also to draw attention to all relevant factors including documents exhibited in the supporting affidavit so as not to mislead the court is applicable in this present case.

[36] The applicant must highlight to the court all the relevant documents in the affidavit in support (encl. 79) ie, exh. LCY-13, exh. SS-3, minutes of creditors meeting of 30 November 2011 where at para. 4 it reads:

> 4. Acceptance of Creditors Claim
>
> Messrs Foremost Systems Sdn Bhd and Messrs Deck Master Sdn Bhd were informed that their submission of POD were accepted but could not be admitted as the liquidator has not been able to confirm their correctness validity with the company records. Based on legal opinion obtained by them, the liquidator informed that he would treat them as 'contingent creditor' pending verification of their claim by him. The only claim that has been applied is the judgment debt of the petitioner creditor.

Therefore the Liquidator of the respondent treated Messrs Foremost Systems Sdn Bhd and Messrs Deck Master Sdn Bhd as contingent creditors. Item 1 under the caption 'Note' in the notice of meeting of creditors states "In accordance of r. 125 of the Companies (Winding-Up) Rules 1972, contingent creditors of the company are not entitled to vote". Therefore para. 16(ii) of the statement is clearly contrary to the minutes of creditors meeting and notice of meeting of creditors which was exhibited in the applicant's affidavit in support (encl. 79).

[37] Further if we look at the minutes of contributories meeting at the last page ie, the attendance list, Messrs Foremost Systems Sdn Bhd and Messrs Deck Master Sdn Bhd were not present at all. It begs the question how the applicant can say that the liquidator of the respondent allowed them to vote at the contributories meeting on 30 November 2011.

[38] In the circumstances I am of the view that had there been full and frank disclosure of the relevant material facts and no misrepresentation of facts as stated above, I am incline to agree with the submission of the liquidator of the respondent that the court would come to the conclusion that:

(a) The liquidator of the respondent did not make the first alleged false statement and the second alleged false statement in the affidavit of 3 March 2014.

(b) Although the liquidator of the respondent had accepted the proof of debt from Messrs Foremost Systems Sdn Bhd and Messrs Deck Master Sdn Bhd, he did not admit their proof of debt.

(c) For the purposes of the creditors' meeting on 30 November 2011, the liquidator of the respondent treated Messrs Foremost Systems Sdn Bhd and Messrs Deck Master Sdn Bhd, as "contingent creditors" based on legal advice.

(d) The only claim that has been admitted by the liquidator of the respondent is the judgment debt of the petitioner, Lim Chiew.

(e) The liquidator of the respondent did not allow Messrs Foremost Systems Sdn Bhd and Messrs Deck Master Sdn Bhd to vote at the creditors' meeting held on 30 November 2011.

(f) The liquidator of the respondent did not allow Messrs Foremost Systems Sdn Bhd and Messrs Deck Master Sdn Bhd to attend and vote at the contributories' meeting on 30 November 2011.

(g) As at the date of the liquidator's witness statement in Suit 291, ie, 8 October 2012, it is true that the respondent had one lawful creditor, namely, Lim Chiew, the judgment creditor. Therefore the liquidator's testimony as set out in para. 10 of the statement is true.

(h) As at the date of the winding up, ie, 11 June 2010, it is true that there were no other creditors admitted by the liquidator except Lim Chiew.

Therefore, the liquidator's testimony as set out in para. 11 of the statement is also true.

[39] For the reasons above, I find the charge of making the alleged false statements and for committal is unsustainable. In the circumstances, on this ground alone, I make the following order:

(a) The *ex parte* order ought to be set aside *ex debito justitiae*;

(b) All committal proceedings pursuant to the *ex parte* order be set aside;

(c) The notice of application filed by the applicant pursuant to the *ex parte* order (encl. 84) be struck out; and

(d) Costs of RM12,000 to be paid by the applicant to the liquidator of the respondent within one month hereof.

Other Matters

[40] For completeness I am of the view that the issue of *mala fides* on the part of the applicant is irrelevant.

[41] The liquidator of the respondent submits there was inordinate delay of six months in commencing this committal proceedings as the leave to commence committal was granted in the winding up court against the liquidator of the respondent on 7 May 2014 and only on 26 November 2014 did the applicant made an *ex parte* application for leave at the High Court for an order of committal.

[42] In my considered view there is no delay for these reasons:

(a) The order obtained on 7 May 2014 is a pre-requisite under the CA 1965 and common law in order for the applicant to proceed with contempt proceedings against the liquidator of the respondent as an officer of the court.

(b) The application for leave under O. 52 r. 3 of the RC 2012 is the foundation of any committal proceedings and it is undisputed time is of essence in any committal proceedings. In this present case I am of the view there is no delay from the time of obtaining the *ex parte* order of 26 November 2014 up until the filing of encl. 84 on 10 December 2014.

Conclusion

[43] For the reasons given above, I find:

(a) This court has the jurisdiction to hear the committal proceedings;

(b) The applicant has the *locus standi* to apply for a committal order;

(c) The *ex parte* order ought to be set aside *ex debito justitiae* and all committal proceedings pursuant to the *ex parte* order on the ground of misrepresentation of statements and encl. 84 to be accordingly struck off with costs;

(d) The issue of *mala fides* on the part of the applicant is irrelevant; and

(e) There is no delay on the applicant's part in commencing this committal proceedings.